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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 34

DAVID BROCK, PETITIONER,

vs.

STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED JANUARY 28, 1952
CERTIORARI GRANTED MARCH 31, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 34

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IN SUPERIOR COURT OF EDGECOMBE COUNTY, STATE OF NORTH CAROLINA

S. T. A T. E	)	
	)	
v.	)	From Edgecombe
	)	
DAVID BROCK	)	

Before HARRIS, J., March Term, 1951, Edgecombe Superior Court. DEFENDANT APPEALED.

STIPULATION OF COUNSEL

It is agreed by the Solicitor for the State and counsel for the defendant David Brock that at the March Term, 1951, Superior Court of Edgecombe County, duly constituted and organized, and regularly and lawfully held, with Judge W. C. Harris presiding, the case of State v. David Brock came on for trial and was tried before said Judge and a jury.

This 6th day of May, 1951.

GEORGE M. FOUNTAIN,
Solicitor for the State.
ROBERT S. CAHOON,
Attorney for David Brock.

STATEMENT OF CASE ON APPEAL

Be it remembered that at a regular term of the Superior Court for the County of Edgecombe for the trial of criminal cases, opened and held in the Courthouse in the City of Tarboro on the 5th day of March, 1949, presiding and

holding said Court according to law the Hon. W. C., Harris, Presiding Judge of the Second Judicial District.

Appearing and prosecuting on behalf of the State, Hon. George M. Fountain, Solicitor of the Second Judicial District.

At the Regular Term of the Superior Court for the County of Edgecombe, for the trial of criminal and civil cases, opened and held in the City of Tarboro on the 17th day of October, 1949, Hon. Leo Carr, Presiding Judge of the Second Judicial Circuit, then presiding and holding said court according to law, the Grand Jury, through their foreman, returned into Court the following bill of indictment as a "True Bill":

BILL OF INDICTMENT (DEFENDANT BROCK)

STATE OF NORTH CAROLINA SUPERIOR COURT
EDGECOMBE COUNTY OCTOBER TERM A.D. 1949

The Jurors for the State upon their oath present that David Brock late of the County of Edgecombe, on the 16th day of September in the year of our Lord one thousand nine hundred and forty-nine, with force of arms, at and in the County aforesaid, did, unlawfully, willfully, maliciously and feloniously in a secret manner, assault, beat and wound one J. D. Wyatt, Mrs. J. D. Wyatt, Barbara Jean Hathaway, Alton Hathaway and Olla Mae Hathaway by waylaying or otherwise, with a deadly weapon, to wit: a rifle, with intent to feloniously kill and murder the said J. D. Wyatt, Mrs. J. D. Wyatt, Barbara Jean Hathaway, Alton Hathaway and Olla Mae Hathaway to the great damage of the said J. D. Wyatt, Mrs. J. D. Wyatt, Barbara Jean Hathaway, Alton Hathaway, and Olla Mae Hathaway, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

FOUNTAIN, Solicitor.

A True Bill:
E. F. BARKER, Foreman, Grand Jury.

The proceedings were thereafter had at said term of court as are indicated in the "Plea of Former Jeopardy" and with its attached "Exhibit A," hereinafter set forth. To avoid needless repetition reference is here made to those documents.

On March 7, 1951, during said March 1951 Term of said Court, this case was called for trial. At the time of his arraignment, and before any other plea, defendant David Brock entered the following written and sworn plea of former jeopardy:

PLEA OF FORMER JEOPARDY

Now comes the defendant, David Brock, and respectfully shows unto the Court:

1. That the defendant is charged in a bill of indictment herein with the crime of secret felonious assault upon J. D. Wyatt, Mrs. J. D. Wyatt, Alton Hathaway, Ola Mae Hathaway, and Barbara Jean Hathaway in Edgecombe County, North Carolina, on September 16, 1949.

2 Said bill of indictment was duly and properly issued and returned by the Grand Jury of Edgecombe County during the October 1949 Term of this Court. Honorable Leo Carr; one of the Judges of the Superior Courts of North Carolina and presiding Judge for this judicial district at that time, was then presiding over this court. Judge Leo Carr was then duly and properly commissioned, designated and empowered to preside over this court. The term of court was duly and regularly constituted in every respect, and had complete and full jurisdiction of the defendant and of the criminal action.

3. The defendant was then placed on trial on the aforesaid valid indictment before this court, a court of competent jurisdiction, after being properly arraigned and after having entered a plea of "not guilty," and a competent jury was properly drawn, properly impaneled and properly sworn to make a true deliverance in the case. (See S. v. Bell, 171 SE 50, 205 NC 225.) Said bill of indictment appears in the record and file of this case, and is by reference included herein. (See dissenting opinion by Stacy, C.J., and Brogden, J., in S. v. Ellis, et als, 200 NC 77, 156 SE 157.)

4. The State then offered evidence as is indicated in the attached Exhibit A, which consists of excerpts from the original transcript of record which was prepared by the official Court Reporter at the said October 1949 Term, and is incorporated herein by reference to show the proceedings therein portrayed which then transpired. The State offered the testimony of witnesses:

Alton Hathaway,
Sheriff Tom Bardin,
J. H. Everett,
Jim Cook, and
Elmer Matthews.

The excerpts are placed in chronological and narrative form for the convenience of the Court.

5. At the conclusion of all its evidence the State moved that a juror be withdrawn and a mistrial ordered and that the case be continued until a later date.

6. The State moved upon the theory that it would at a later date be able to present a stronger case against the defendant David Brock in that its witnesses Cook and Matthews might at a later date testify differently or to additional facts than at the first trial.

7. The defendant David Brock objected to and resisted the motion.

8. The Court made certain findings of fact which appear in Exhibit A and allowed the State's motion, all of which appears in Appendix A. This was done without cause or proper cause.

9. The defendant in apt time and manner objected to the Court's findings of fact, to its action in withdrawing a juror and declaring a mistrial, and the defendant properly reserved exceptions to each of said actions and rulings by the Court.

10. The defendant was at said October 1949 Term of this Court tried for the same offense for which and of which he is now charged in this Court in this criminal action (See STATE v. MANSFIELD, 207 NC 233, 176 and Article I, Section 17, of the Constitution of North Carolina), and was at said October 1949 Term of this Court put in jeopardy of life and limb and liberty for the same offense and upon the same bill of indictment upon which he stands charged in this Court and upon which the State again seeks to put him on trial and in jeopardy of life, limb and liberty. (See Amendment V of the United States Constitution.)

11. The defendant has previously been put in jeopardy and tried for the same offense for which it is now sought herein to put him again in jeopardy and upon trial, all in violation of his rights under the constitutions and laws of North Carolina and of the United States, including Article I, Section 17 of the Constitution of North Carolina, Amendment V of the Constitution of the United States, and the due process clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, defendant prays the Court that he be discharged and go forth without day.

FOUNTAIN & FOUNTAIN
ROBERT S. CAHOON
Attorneys for Defendant.

NORTH CAROLINA,
EDGECOMBE COUNTY,

David Brock, being first duly sworn, deposes and says that he is the defendant in the above entitled case, and that he has read the foregoing and annexed plea of former jeopardy and knows the contents thereof; that the same is true of his own knowledge, except as to the matters and things alleged on information and belief and as to some matters of record and as to some matters of law, and as to those matters and things he is informed and believes it to be true.

DAVID BROCK

Sworn to and subscribed before
me this 7th day of March, 1951.

LUCY G. MILLS
(SEAL) Notary Public
My commission expires Jan. 30, 1952.

EXHIBIT A: Excerpts from official Transcript of Record prepared by Miss Virginia B. Vincent, official court reporter, in Case of State v. David Brock, No. 672, October 1949 Term of Superior Court of Edgecombe County, North Carolina.

Excerpts are placed in chronological and narrative form for the convenience of the Court.

STATE'S EVIDENCE

ALTON HATHAWAY, sworn, testified: Direct Examination by Solicitor Fountain:

I am the son-in-law of Mr. J. D. Wyatt. I married his daughter. On or about the 16th of September I went over to Mr. Wyatt's home to spend the night. My wife and baby were there. My child was about a month old. Her name is Barbara Jean. My wife's name is Ola Mae. We occupied the front left-hand room facing the house. We went to bed that night. There was one bed and one couch in that room. There was a basket which the baby was kept in. We went to bed about 9:30 or 9:45 at night. We got back up again to get milk for the baby. That was

about ten o'clock. My wife got up. She was up three or four minutes seeing about the baby. The light was on. After she went to bed the house was in darkness.

The house is located on Highway 264 west of Tarboro, about four miles out. It sets about 40 or 45 feet off the highway.

After my wife had gone to bed, we were aroused by shots. That was approximately 15 minutes after my wife had gone back to bed. I had not gone to sleep. I heard an automobile going west shortly before I heard the shots. I could tell by the sound that the automobile slowed down. I did not hear it turn around. I heard it pick up speed. Then it was going toward Tarboro. Just as the car got at the right-hand corner of the house facing the road the shots began. I determined the position of the car from the firing and from the noise of the car. Five shots were fired in rapid order. Four came in the room we were in. One went over the porch. There were two windows in the room facing the road. The shots came through the window. Two went through the glass part of the window, which was raised. Two went through the lower screen part. The nearest bullet in the wall from where my baby was laying was 36 or 40 inches. There were two bullets in that wall. The nearest one from where my wife and I were in bed was about 5 feet. It was nearer my wife, about 5 feet from her. Another bullet was found lodged in the side wall behind a picture. One glanced off and was found under the bed.

SHERIFF TOM BARDIN, being sworn, testified:
Direct Examination by Fountain, Solicitor:

I am Sheriff Tom Bardin. On September 16th I saw Alton Hathaway and J. D. Wyatt after the shooting that took place that Hathaway testified about. I conducted an investigation of the shooting. As a part of the investigation I made an effort to locate David Brock. I first saw him, after I began my investigation, in the

yard of his home on Fountain Street. He was in a car I had seen on St. James Street before going to his house. He was the only person in the car. When I saw it on St. James Street, he was headed east toward Main Street. I was going west. The car lights were on. We turned around to try to overtake the car. I had lost sight of the car. It was beginning to rain. Just a short time later I saw him in the yard. I went over to Fountain Mill village. This was about a mile and a half or two miles from where I first saw the car on St. James Street.

During the trip I did not see Brock's car until I got near his house. After I made a turn onto Fountain Street I saw some lights on an automobile flash on and then off and then pull into a house. The headlights were not burning on that car. I saw the brake lights. It went into David Brock's yard. I pulled up beside the car that was stopped and David Brock was getting out of it. Nobody else was in the car. Officer Everett was with me. That was a few minutes before 11:00 o'clock. St. James Street is the same as U. S. Highway 258, the same road J. D. Wyatt lives on.

When I saw Brock at his home we called him to get into our car, that we wanted to talk to him.

In the course of our conversation, Mr. Wyatt or Mr. Everett, or I one, asked him what did he know about the shooting into Mr. Wyatt's house some few minutes before. He said he knew nothing about it. That he had been on picket duty at the back gate all night and had not left there and that we couldn't pin that on him.

He stated that he was on picket duty at the back gate at all times and did not leave except to get some coffee at Jim Cook's house.

I did not bring him in at that time.

Later on that night I took Jim Cook and Elmer Matthews in custody. Thereafter, David Brock was taken in custody.

After the three were arrested, I had a conversation with Jim Cook, Elmer Matthews and

David Brock together. This took place in the County jail. It was after they were taken in custody and on the same night of their arrest. At the time I did not offer any reward, hope of reward or promise to either of them. I did not offer any threat, force or any compulsion of any nature to require either of them to say anything. I had not made any promise to David Brock concerning this case. I told Mr. Cahoon that I assured Brock the next day that if he would tell me certain things, I would not use it against him. I am not purporting to tell anything that was said by David Brock after I had that understanding with him the next day.

On the night of September 16th, in the presence of David Brock, Jim Cook stated that he, Jim Cook, Elmer Matthews and David Brock went to the home of J. D. Wyatt on Elmer Matthews' car and with his, Jim Cook's, gun, and that Brock fired the gun into the home of J.D.Wyatt.

Elmer Matthews was present when that statement was made. I asked Elmer Matthews what if anything he had to say to that statement. He said, "That's right."

I asked David Brock what if anything he had to say. He said, "I have nothing to say."

RECROSS-EXAMINATION by Robert S. Cahoon, Counsel for Defendant:

Q Sheriff, David Brock had already told you that he didn't know anything about that, hadn't he?

A He did not say that.

Q Well, you went to his house, didn't you?

A Yes, sir.

Q And told him there had been a shooting around Wyatt's house and he said he didn't know anything about it?

A He said, "You can't pin that on me."

Q He said he had been on picket duty and that he didn't know anything about it, didn't he?

A He said, "You can't pin that on me."

Q You are denying that he said it?

A He said, "You can't pin that on me."

Q You asked him, "What do you know about the shooting?" didn't you?

A Someone asked him that, I said. One of us.

Q And his reply was that he knew nothing, wasn't it?

A He replied that he had been on picket duty at the back gate and had not left except to go to Jim Cook's house to get coffee and that we could not pin that on him.

Q He replied, "Nothing," did he not?

A He replied that he had been on picket duty at the back gate and stated that we couldn't pin that on him.

Q Did he ever use the word "nothing"?

A I don't recall.

COURT REQUESTS THE REPORTER TO READ THE ANSWER OF THE WITNESS ON DIRECT EXAMINATION. ANSWER WAS READ AS FOLLOWS: "He said he knew nothing about it. That he had been on picket duty at the back gate all night and had not left there and that we couldn't pin that on him."

BY THE COURT: What is your answer in view of the fact that the reporter has read the testimony and refreshing your recollection as best you can from that and other sources, what do you now say is your best recollection of what was said by Brock at that time?

A Well, sir, I am in a difficult position. I have stated one thing and then denied it.

Q Well, it is a question of what your best recollection is, and according to the reporter's notes he said "nothing" when you asked him what he knew about it, and that he was on the picket line. Now, you may say whether or not that is correct, or if your recollection is different.

A Well, I will have to say that that is correct. That he said he knew nothing about it, that he was on duty and they could not pin it on him.

RECROSS-EXAMINATION by Cahoon - continued:

Q Now, in jail there when you testified about what Cook said, Brock said, "No, I'm not

making a statement until I see a lawyer," isn't that right, Sheriff?

A No, sir. He definitely did not say that.

Q And you are just as sure about that as you were a minute ago about his not saying that he knew nothing about it?

A The only statement he made in the jail was, "I have nothing to say."

Q You are just as sure about that as you were about his not saying he knew nothing about it?

A There is no doubt in my mind about this.

Q You had no doubt in your mind about the other and you told me time and time again, "No sir, he did not say it." And you know this boy's liberty is at stake, don't you?

Objection - sustained.

Q How about your memory, Sheriff? Does it come and go at five-minute intervals?

A I've got a pretty good memory. I just got confused.

Q You don't know anything about what Brock did or didn't do, except what Cook told you, do you?

A I'd rather not answer that.

Q All right. I'll withdraw the question out of tenderness of feeling toward you, Sheriff. Now, you testified that St. James Street is the same thing as this highway Mr. Wyatt lives on, didn't you?

A Yes, sir.

Q That's Highway 258, isn't it?

A Yes.

Q He lives about four miles from town, doesn't he?

A Yes.

Q Is it St. James Street when it gets to Pinetops and Farmville?

A No, sir.

Q It is not St. James Street when it gets to Wyatt's house, is it?

A No, sir.

Q And this boy was four miles from Wyatt's house when you saw him, wasn't he?

A Yes, sir.

Q And you are not even sure it was his car, are you?

A I said I don't know his car.

Q And where is the main entrance into that mill over there?

A It is on Office Street.

Q And that is where the office personnel goes in, isn't it?

A Yes.

Q And that is the main gate, isn't it?

A It's right nearby.

Q And the main office is there and not on St. James Street where you said it was, isn't it?

A The main gate where everyone goes in with the exception of office personnel is.

Q My question was: Is the main office on a different street entirely from where you testified the front gate was?

A I said the office was on Main Street.

Q When you say "front gate" that is your terminology, isn't it?

A That is my terminology.

Q To Mr. Carter the front gate might be over there where he walks in every morning, might it not?

Objection - sustained.

Q Sheriff, let's refresh your recollection a little bit more. When you asked Matthews about Cook's statement, he said, "That's what he says"?

A He said, "That's right," and then, "That's what he says".

Q Meaning Cook?

A Yes.

J. H. EVERETT, being sworn, testified:

Direct Examination by Solicitor Fountain:

I am a police officer of the Town of Tarboro. I was in the car with Sheriff Bardin the night Mr. Wyatt's house was shot into before David Brock was first talked to by the Sheriff. I saw David Brock on his car on St. James Street

shortly before seeing him at his home. I knew his car when I saw it. I had seen it earlier that night. I came to work at 8:00 o'clock and it was very shortly after that we were patroling the neighborhood of Hart Mill. The car was parked beside the picket tent on St. James near the front gate. I can't say exactly what time it was. I saw the defendant David Brock standing close to his car. At the time I saw the car with Sheriff Bardin it was coming towards town, on St. James Street. We were going in the opposite direction. That was between 10:30 and 11:00 o'clock. The lights were on when we met it. The Sheriff turned his car around. I could not see the car that had just passed after the Sheriff turned around. Then we went to Brock's home. We saw the automobile near there. It was running without lights. He drove up in his front yard. Brock got out of the car, nobody else.

JIM COOK, duly sworn, testified:

My name is Jim Cook. I know David Brock. I saw him on the night of September 16.

Q Did you see him in an automobile which went by the home of J. D. Wyatt?

(Witness Jim Cook objects to answering on the ground the answer would tend to incriminate him, and upon his constitutional right not to be so examined. Objection sustained.) The same procedure was had as to the following questions:

Q Do you know who fired a rifle at the home of J. D. Wyatt?

Q Did David Brock tell you whether he shot at J. D. Wyatt's house or not?

Q Did you see anyone shoot at the house of J. D. Wyatt?

UPON THE COURT MOVING that the witness Jim Cook would not be required to answer the

question, "Did you see anyone shoot in the house of Mr. J. D. Wyatt?" the Solicitor for the State, for the purpose of the record and in the absence of the jury, requests that the Court find the facts upon which said ruling was made. THE COURT FINDS THE FACTS AS FOLLOWS: That the witness Jim Cook was convicted by a jury at this term of court of the charge of assault with a deadly weapon, the charge being one which grew out of the same transaction with which the defendant David Brock is charged, and that the evidence in the case in which the witness Cook was convicted tended to show that the defendant Brock fired the rifle bullets into the home of J. D. Wyatt and that the witness Cook was present, aiding and abetting said Brock in the commission of said offense. At the time said Cook was called as a witness in this case no judgment had been entered in his case on the charge of assault with a deadly weapon. Counsel for Cook informs the Court that in the event of an adverse judgment that Cook will appeal therefrom to the Supreme Court.

Objection by the defendant David Brock to this finding of fact. Overruled. Exception.

ELMER MATTHEWS, duly sworn, testified:
Direct Examination by Solicitor Fountain:

THE WITNESS ELMER MATTHEWS OBJECTS TO TAKING THE STAND and stands on his constitutional rights not to be examined as a witness upon the ground that the examination might tend to incriminate him. THE COURT FINDS that no questions have been asked of the witness by which the Court would determine whether or not there would be any evidence elicited from the witness that would tend to incriminate him, and therefore overrules the objection to taking the stand.

Q Your name is Elmer Matthews?
A Yes, sir.
Q Do you know David Brock?
A Yes, sir.
Q Did you see him on the night of September 16th?
Objection - overruled - exception.
A Yes, sir.
Q Did you see him in an automobile which went by the home of J. D. Wyatt?
Objection - sustained.
Q Do you know who fired a rifle at the home of J. D. Wyatt?
Objection - sustained.
Q Did David Brock tell you whether he shot at J. D. Wyatt's house or not?
Objection - sustained.
Q Did you see anyone shoot at the house of Mr. J. D. Wyatt?
Objection sustained.

UPON THE COURT MOVING that the witness Elmer Matthews would not be required to answer the question, "Did you see anyone shoot at the house of Mr. J. D. Wyatt?" the Solicitor for the State, for the purpose of the record and in the absence of the jury, requests that the Court find the facts upon which said ruling was made. THE COURT FINDS THE FACTS as follows: That the witness Elmer Matthews was convicted by a jury at this term of court of the charge of assault with a deadly weapon, the charge being one which grew out of the same transaction with which the defendant David Brock is charged, and that the evidence in the case in which the witness Matthews was convicted tended to show that the defendant Brock fired the rifle bullets into the home of J. D. Wyatt and that the witness Matthews was present, aiding and abetting said Brock in the commission of said offense. At the time said Matthews was called as a witness in this case no judgment had been entered in his case on the charge of assault with a deadly weapon. Counsel for Matthews informs the Court that in the event

of an adverse judgment that Matthews will appeal therefrom to the Supreme Court.

OBJECTION BY DEFENDANT DAVID BROCK TO THIS FINDING OF FACT. OVERRULED. EXCEPTION.

MOTION BY THE STATE THAT A JUROR BE WITHDRAWN AND A MISTRIAL ORDERED AND THE CASE CONTINUED PENDING THE FINAL JUDGMENT IN THE CASE OF "STATE v. ELMER MATTHEWS AND JIM COOK."

BY THE COURT: THE COURT FINDS AS A FACT that the Solicitor for the State tried two cases growing out of the same transaction, STATE v. JIM COOK, and STATE v. ELMER MATTHEWS, and that the evidence in said cases tended to show that the defendant David Brock fired rifle bullets into the home of J. D. Wyatt and that the defendants Jim Cook and Elmer Matthews were present, aiding and abetting him in committing said offense; that the defendants Jim Cook and Elmer Matthews were convicted at this term of court on the charge of Assault with a deadly weapon, and after their conviction the Solicitor called for trial the case of "State v. David Brock," and during the course of the trial undertook to use the defendants Jim Cook and Elmer Matthews as witnesses for the State. Whereupon, counsel for said defendants advised them not to testify and to rely upon their constitutional rights not to give testimony in respect to matters that would tend to incriminate them for that no judgment had been entered in their cases and that it was their intention to appeal to the Supreme Court if an adverse judgment was entered and the Court ruled that said defendants would not be required to testify as to facts that would tend to incriminate them for the reason that their cases had not been finally disposed of in the Supreme Court. The Court being of the opinion that the ends of justice require that the State have available for its testimony of the witnesses Jim Cook and Elmer Matthews when the case is tried and that the State is entitled to have those witnesses to testify after their cases have been disposed of in the Supreme Court, in

its discretion withdraws a juror, Roland Fountain, and orders a mistrial of this case and that the same be continued.

DEFENDANT OBJECTS to the finding of facts, conclusions of law and the ruling of the Court. Overruled. EXCEPTION.

BY THE COURT:

Ladies and Gentlemen of the Jury, you have been listening for a part of yesterday and today to the trial of the case of "State v. David Brock" and have heard some argument in respect to the testimony of certain witnesses and part of the argument you did not hear, but the State having undertaken to offer the testimony of two witnesses, Jim Cook and Elmer Matthews, and for certain reasons that have been made to appear to the Court, the testimony of those witnesses, at the present time, is not complete and available to the State, the Court is of the opinion that the ends of justice require that this case not be completed and that a mistrial be ordered and this case continued to such time as the testimony of those witnesses might be available for the State without any legal objections to it. Therefore, the Court in its discretion has withdrawn a juror and ordered a mistrial in this case and the jurors will not be concerned with the case any further.

The Court desires to thank you.

I, Virginia B. Vincent, official court reporter for the Second Judicial District of North Carolina in the Superior Courts of said District, do hereby certify that the foregoing and attached transcript of record in the case of "State v. David Brock" is a true and correct recording of the proceedings in said case.

This the 25th day of November, 1949.

/s/ VIRGINIA B. VINCENT
Reporter.

Sworn to and subscribed before me,
this 25th day of November, 1949.
EVELYN J. OVERTON,
Notary Public. (NOTARY SEAL)
My com. expires: January 21, 1951.

The proceedings then had on said plea were as set forth below in a statement of said proceedings reduced to writing, made a part of the record, and signed by Hon. W. C. Harris, Judge Presiding.

PROCEEDING AND RULING ON PLEA OF FORMER JEOPARDY

At the time of the arraignment, and before any other plea, the defendant David Brock entered the written and sworn plea of former jeopardy which is filed and appears of record. The Solicitor announced disagreement as to the legal conclusions therein, denying that the facts stated were sufficient to constitute former jeopardy.

The Court ruled that the facts set forth in the plea, taken as true, are insufficient to sustain the plea of former jeopardy, and overruled and denied same.

To the said ruling, defendant David Brock in apt time and manner objected and reserved an exception.

Defendant David Brock then moved the Court to permit his plea of former jeopardy to go to the jury, and the facts to be passed on by the jury.

The Court denied the motion. The defendant David Brock objected to said ruling in apt time and reserved an exception.

This 7th day of March, 1951.
W. C. HARRIS
Judge Presiding.

The foregoing exception to the Court's overruling of his plea of former jeopardy constitutes defendant's
EXCEPTION NO. 1.

The foregoing exception to the Court's denial of his motion that the Court permit his plea of former jeopardy to go to the jury, and that the facts be passed on by the jury constitutes defendant's
EXCEPTION NO. 2.

At this point, the Solicitor for the State announced in open Court that it, the State, would not ask for a verdict of guilty of secret assault, but would ask for a verdict of guilty of assault with a deadly weapon.

PLEA: Defendant then, reserving his rights under his plea of former jeopardy and his Exceptions heretofore set out, pleaded "Not Guilty." Whereupon a duly summoned jury was properly selected, impaneled and sworn to try the cause.

The verdict, judgment and appeal entries are hereinafter set forth.

STATE'S EVIDENCE

ALTON HATHAWAY, being sworn, testified:
(Direct Examination by Mr. Fountain)
On the night of September 16, 1949, my wife, my child Barbara Jean Hathaway and I spent the night at Mr. Wyatt's home. His home is located four miles out on the Wilson highway, west of Tarboro. It is the highway that goes to Wilson, out St. James Street, beyond the mill. Going from Tarboro to Wilson he lives on the right-hand side of the road. My wife, my child and I

were occupying the living room. That is the front room. The house sits about 50 feet from the highway. My child Barbara Jean was three or four weeks old. We were sleeping or preparing to sleep in the room. There was a bed there. There was a couch there which could be used to sleep upon. I believe it was in front of one of the windows. There are two rooms on the front of the house. Altogether there were four rooms and a back porch. Mr. Wyatt was occupying one of the back rooms. His wife was occupying the other front room. He was in the room behind the one I was in.

Sometime that night, just before it took place, I heard an automobile come by the house. As the car got in front of the house it started reducing speed. It was going toward Wilson. I could hear from the racing of the motor that it was turning around down the road. Then it started back toward town, picking up speed. Just as it got in front of the house five shots fired. I could tell from the sound that they were rifle shots.

Two bullets lodged in the wall dividing the front two rooms and one went straight back into the wall. Four shots came through the window of the room my wife, my child and I were in. The nearest one came to my child was 36 inches. She was then in a basket in front of a door which went into the back room. The bullet went over it and to the side. The bullet went into the wall. It came through. Two bullets lodged in the wall separating the two rooms. It was about a 16-foot room. My wife and I were on the opposite side of the room. The fourth bullet came straight into the room and lodged in the wall. Some of the bullets were found. I think Mr. Wyatt turned them over to the Sheriff. I think we found three or four of them. The fifth one went up over the porch. It struck the building just over the porch and went into the loft of the house. When the shots were fired I got up and so did Mr. Wyatt. We came to town to the Police Station. I saw Mr. J. A.

Everett there. I saw Sheriff Bardin. We started out to Mr. Wyatt's. We did not get out there the first time.

On the way to Mr. Wyatt's we saw Brock's car come out of the new village over at Hart Mill. It was coming up St. James Street. At that time the car's lights were on. We turned around when we met Brock's car. We followed him over to his house. About three houses down from his house the lights on Brock's car went out. It was rainy or misty that night.

It was 30 to 45 minutes after the shooting that I saw Brock's car. I saw it on the same street that goes by J. D. Wyatt's house when it gets out in the country. We followed the car to Brock's house. He was the only one in it at the time. I was then a member of the Textile Union organized and existing at Hart Mill at the time. My wife was not an employee of the mill. J. D. Wyatt was a watchman at the gate. He was not a member of the union. At that time the union was on strike. It had been on strike about three months. I went to the picket tent early that night, on my way to Mr. Wyatt's house, I went there about 7:30. I saw David Brock, Jim Cook and A. Q. Blackmon there. I did not see Elmer Matthews.

It was misting rain, and I stopped up under the tent. There was a crowd at the corner of the tent. That's where I saw them, standing in a group. They were standing together. Just before the car came by, prior to the shooting, there was a light on in the room my wife and I occupied. We had gone to bed. My wife got up to get the baby some milk. The light went off just a few minutes before the car came by, going by the house. At the time the car got there all the lights in the house were out. The shooting was about 8:30 or 9:00 o'clock.

CROSS-EXAMINATION (by Mr. Cahoon)

I was a member of the union when this thing occurred. I was friendly with David Brock. There were no hard feelings between us. I

stopped at the picket tent on my way home. There was a crowd of people there. I remember seeing Brock and Cook there, but not Matthews. This group got off to itself. I would say there were maybe 25 or 30 people there altogether. People were standing in little groups talking to one another. I spoke to different ones. I did not speak to Cook and Brock. I stood there until it quit raining; then I went on home. It was about 7:30.

I testified about this once before. I don't remember whether I then said the shooting happened around 10:00 or 10:45. I would say the shooting happened between 8:30 and 9:30. (Witness is handed transcript of testimony in previous trial and reads.) Now, after having read that and refreshing my memory it is my best recollection that my wife and I went to bed about 9:30. After that my wife got up for milk for the baby. It was not yet ten o'clock. Then we went back to bed. About ten minutes later I heard a car pass. It was getting up to about ten o'clock. It had been three or four hours since I saw Brock and Cook. I did not see the car. I do not know who was in it. There had been no hard feelings between me and Blackmon. We were members of the union, working together at the time. When I came in town, 30 or 40 minutes after it happened, I saw Brock's car in town. It came out of the New Hart village. It was not coming from the direction of Wyatt's house when we met it, at the time we first saw it. Where we saw Brock's car was three or four miles away from where the shooting happened. I could watch Brock's car's tail lights all the way to his house. Just before you get to Brock's house the houses and lots are small. He cut his lights off just before he got to his house and cut up into his yard. That is all I know about it.

J. D. WYATT, being sworn, testified: Hathaway, his wife and child were in my home on the

night of the shooting. I had been employed at Hart Mill prior to that night, and since. I had been a union member. I thought I was at the time. If I was not a member at the time I did not know it. My job at the mill was watching. I was home the night of September 16.

Q Did you attempt to go to work the morning of the 14th?
Objection - overruled - exception.
EXCEPTION NO. 3.
A I attempted to.
Motion to strike - overruled - exception.
EXCEPTION NO. 4.

Q Do you recall what day of the week that was?
Objection - overruled - exception.
EXCEPTION NO. 5.
A I think it was on Wednesday.
Motion to strike - overruled - exception.
EXCEPTION NO. 6.

Q Was the shooting the following Friday night?
Objection - overruled - exception.
EXCEPTION NO. 7.
A Yes, sir.
Motion to strike - overruled - exception.
EXCEPTION NO. 8.

Q On that Wednesday morning how many persons were at the mill gate when you started to work?
Objection - overruled - exception.
EXCEPTION NO. 9.
A When I came down to work about 5:45 there wasn't anybody at the gate when I drove up in my car, but across the street at the picket tent there was approximately 75 or 50 people over there.
Motion to strike - overruled - exception.
EXCEPTION NO. 10.

Q Where did you put your car?
Objection - overruled - exception.
EXCEPTION NO. 11.

A Across the street below the picket tent.
Motion to strike - overruled - exception.
EXCEPTION NO. 12.

Q Then where did you go?
Objection - overruled - exception.
EXCEPTION NO. 13.
A I started to go to get into the gate to go to work.
Motion to strike - overruled - exception.
EXCEPTION NO. 14.

When I started to get out of the car Jim Cook . . .
Objection and motion to strike - overruled - exception.
EXCEPTION NO. 15.

Jim Cook started across the street and said, "Come on boys if you are going to back me up."
Objection and motion to strike. Defendant moves that witness be qualified to show defendant was not present. Overruled. Exception.
EXCEPTION NO. 16.

So they crossed the street. I guess 40 or 50 of them and lined up in front of me.
Motion to strike. Overruled. Exception.
EXCEPTION NO. 17.

Q Do you know whether or not Brock or Blackmon were in that group?
A No, I don't know about that.
Motion to strike all of the foregoing testimony pertaining to the incident.
Overruled. Exception.
EXCEPTION NO. 18.

At this point defendant moved that a juror be withdrawn and a mistrial directed on the grounds that the foregoing evidence was improperly permitted to go to the jury, to his prejudice. Overruled. Exception.
EXCEPTION NO. 19.

Q What did Jim Cook say to you when you went to the gate to go in?

Objection - overruled - exception.

EXCEPTION NO. 20.

A He said if I went back to work the undertaker would have a job.

Motion to strike. Overruled. Exception.

EXCEPTION NO. 21.

I said all right, boys. If that's the way you feel about it let's go down to Wooten's and get some coffee. I'll pay for it.

Motion to strike. Overruled. Exception.

EXCEPTION NO. 22.

At this point defendant again moved that a juror be withdrawn and a mistrial ordered on the grounds that the foregoing testimony was improperly permitted to go to the jury to his prejudice. This constitutes

EXCEPTION NO. 23.

I was in the room behind the room Alton Hathaway was in. One bullet came in there. It came through the wall and through a mirror and lodged in a dresser in the room I was in. Alton and I went to the police station after the shooting.

CROSS-EXAMINATION (by Mr. Cahoon)

On September 14 I did not see Brock or Blackmon at the time I went to the mill gate.

JIM COOK, being sworn, testified (Direct Examination by Mr. Fountain):

I am a nephew of Mr. Wyatt. Prior to the shooting I was a Hart Mill employee on strike. On the day of the shooting I saw David Brock, A. Q. Blackmon and Elmer Matthews. I first saw them down at the picket tent, I believe. We went to my home from the picket tent. Sometime that evening we went to a road known as Lover's Lane, before dark. There was some talk about what they were going to do with Wyatt, about

getting even with him. All were talking. I have already been tried and am serving a sentence now. The same thing applies to Elmer Matthews. We left Lover's Lane and went to the mill. We went on Matthews' car. There were Brock, Blackmon, Matthews and me.

That night we went to my home, all four of us. We drank coffee there. We went on Matthews' car. Graham Griffin came out of my house first. He was with us. Graham asked, "Where is your rifle, Jim?" I told him it was in the other room. The next time I saw him he was sitting in the car. When I saw the rifle again it was in Matthews' car. All five of us had been drinking coffee at my house. We all left together. We went back to the picket tent. Me and Griffin got out. I saw Blackmon, Brock and Matthews again in about 30 minutes. They came back and called me, said, "Let's ride around somewhere." I got in and they went out toward Wyatt's house. Matthews was driving. I was in the front seat. Brock was on the right side in the back. Blackmon was in the back. I did not know where we were going. Just before we got to Wyatt's house I found out.

There was some discussion about who could shoot from the left shoulder, between Brock and Blackmon. I said that was a wrong thing to do, so they didn't do it the first time. They went on down to the next house and turned around and came back and when they got right in front of the house Brock said he was going to shoot over the house. Instead of shooting over it they shot in it. They shot five times. It was my rifle. After the shooting they took me back to my house. I got out. David Brock carried my rifle back in the house. I went back to the picket tent with them. I left them at the office gate. They went around to the back gate, I believe. I saw Brock's car at the picket tent early that night. I talked with Brock or Blackmon or Matthews down at the tent before they went to my house. I saw Alton Hathaway at the tent earlier that night.

Q Do you remember two mornings earlier before that when Mr. Wyatt reported to go to work?
Objection - overruled - exception.
EXCEPTION NO. 24.
A Yes.
Motion to strike; overruled; exception.
EXCEPTION NO. 25.

Q How many people did you say were there?
Objection - overruled - exception.
EXCEPTION NO. 26.
A Maybe 40 or 50.
Motion to strike; overruled; exception.
EXCEPTION NO. 27.

Q Did Mr. Wyatt get in?
Objection - overruled - exception.
EXCEPTION NO. 28.
A I don't think he did that morning.
Motion to strike; overruled; exception.
EXCEPTION NO. 29.

After the shooting I first saw the police officers around 11 o'clock. I was at the office gate at the mill. They had my rifle.

Q Did you later on that night tell Sheriff Bardin what had happened?
Objection - overruled - exception.
EXCEPTION NO. 30.
A Yes.
Motion to strike; overruled; exception.
EXCEPTION NO. 31.

Q Do you remember what you told the Sheriff in the presence of David Brock?
Objection - overruled - exception.
EXCEPTION NO. 32.

At this point defendant moves that he be permitted to examine the witness and State's witness Sheriff Bardin to establish that prior to the time involved in this testimony the defendant had stated to Sheriff Bardin that he knew nothing about the shooting, and that at the time in question he did not

acquiesce in any statement made by Cook, but repudiated it and stated that he was standing on his constitutional right to make no further statement. Overruled. Exception.
EXCEPTION NO. 33.

A The Sheriff asked me was it my rifle and I said it was, and he asked me did I know who done the shooting and I told him David Brock and he wanted to know who was driving the car and I told him it was Elmer Matthews.

Motion to strike; overruled; exception.
EXCEPTION NO. 34.

CROSS-EXAMINATION (by Mr. Cahoon)

I have never threatened Mr. Wyatt. During all the time they held me in jail and questioned me at length and before I was tried and for the length of time that elapsed there I never mentioned to anybody that A. Q. Blackmon had anything to do with it. I was finally convicted and went to the road camp. I first went down to a camp near Ahoskie. After that I was transferred somewhere else and got sick with kidney trouble and had to go to the prison hospital in Raleigh. I got down pretty low and dejected in my mind. During the time I was in a camp near Ahoskie a State investigator came to see me. I told him I did not have anything to do with it and that I knew nothing in the world against Brock. He told me I ought to sit down and write Mr. Fountain about it. I thought he meant Mr. L. H. Fountain, the lawyer who represented me. I wrote that letter to Mr. Fountain while I was in camp. I did it of my own free will and accord. I said:

"Mr. Fountain, I talked to the S.B.I. last week and he said I should write and tell you what I can testify about in Brock's trial. Mr. Fountain, I don't know anything on Brock and therefore I cannot say anything against Brock. He did not have anything to do with the shooting. I'd rather pull the whole two years than appear against Brock."

I signed my name to that letter. Nobody in the world asked me to do that.

The first statement I made to the Sheriff I denied having anything at all to do with the shooting. I said somebody had borrowed my rifle and had taken it away, and I had nothing to do with it.

David Brock has always denied that he had anything to do with it, at all times.

REDIRECT EXAMINATION (by Mr. Fountain)

It was Mr. L. H. Fountain, Mr. V. E. Fountain, Mr. Robert Cahoon and Mr. Vinson Bridgers who represented me. When I addressed a letter to Mr. L. H. Fountain I thought he was the man the S.B.I. representative was talking about.

Q After you wrote that letter you talked to your father, did you not?

Objection - overruled - exception.

EXCEPTION NO. 35.

A Yes.

Motion to strike; overruled; exception.

EXCEPTION NO. 36.

Q Why did you decide to tell what you are now telling after you wrote the letter?

Objection - overruled - exception.

EXCEPTION NO. 37.

A That's when I talked to my father about it.

Motion to strike; overruled; exception.

EXCEPTION NO. 38.

He wanted me to tell the truth about it.

Motion to strike; overruled; exception.

EXCEPTION NO. 39.

SHERIFF TOM BARDIN, being sworn, testified (Direct Examination by Mr. Fountain):

I am Sheriff of Edgecombe County. On the night of September 16, 1949, I made an investigation of a shooting at Mr. Wyatt's home. I first went to Tarboro police station where I met Wyatt and he gave me the details. No de-

fendant had then been taken in custody. Mr. Everett, Mr. Hathaway, Mr. Wyatt and I started to Wyatt's home on St. James Street. We passed an automobile belonging to David Brock going in the opposite direction. We turned around to overtake him. When we turned we were unable to see any vehicle ahead of us but we proceeded until we were within 200 yards of Brock's home. We saw a brake or tail light flash on and saw this car turn into David Brock's yard. When we turned in there David was there. He was the only person in the car.

I might say right now that because of it being so long ago I may be a little vague in my remembrance of every detail, but we did talk to him about it. I did not take him in custody at that time. We left his house and went to the police station. Then I went to Mr. Wyatt's house. I found where someone had shot through the window into his front room which was a combination living room and bedroom. As I recall it there were three shots through the window pane and a fourth through the window sash. I never saw the fifth shot. I recovered two bullets and half of another. There were two holes as I recall, one over the mantelpiece and one through the wall. The mantel was opposite the window; and one a little lower and to the left as you face the mantel, which went all the way through the wall and lodged into the back of a dresser in an adjoining room. That was the back room which Mr. Wyatt said he was sleeping in.

There was a third, a sort of ricochet, in the right-hand wall as you went in the room. The baby crib was a little to the left of the window as you faced the window in the room. There was a bullet hole about 3 feet from the crib. It went all the way through the wall. From there I returned to the police station. Mr. Everett, Mr. Waldon and Jim Cook were there along with the Desk Sergeant. Jim admitted ---

Objection - overruled - exception.
EXCEPTION NO. 40.

Q What did Cook say?
Objection - overruled - exception.
EXCEPTION NO. 41.
A Cook stated that he and David Brock and Elmer Matthews were together, that they were on Elmer Matthews' car, Matthews was driving, the gun that was fired into the Wyatt home belonged to him and it was fired by David Brock.
Motion to strike; overruled; exception.
EXCEPTION NO. 42.

Then Elmer Matthews and Brock were picked up. Thereafter I talked with the three of them. I got the three of them together after Brock and Matthews were arrested.

Q What did Cook say in the presence of Brock and Matthews?
Objection - overruled - exception.
EXCEPTION NO. 43.

At this point defendant moves that he be permitted to show by the witness that defendant had, prior to the time being testified about, stated to the witness that he knew nothing about the shooting, that he in no way acquiesced in Cook's statement, that he stated at this time that he was standing on his constitutional right to make no further statement. Overruled. Exception.
EXCEPTION NO. 44.

A He stated in the presence of Brock and Elmer Matthews that the three of them went out there to Wyatt's house on Matthews' car with Matthews driving and Brock shot into the house and that the gun belonged to him, to Cook.
Motion to strike; overruled; exception.
EXCEPTION NO. 45.

I then asked the defendant Matthews if that was right and he said it was.
Motion to strike; overruled; exception.
EXCEPTION NO. 46.

I asked the defendant Brock if that was right.

He said, "I have nothing to say," and said he stood on his constitutional right to make no statement.

I talked to Jim Cook again in November 1950. I brought him from Hertford County Prison Camp near Ahoskie to be a witness, to testify against David Brock. He did not testify. The case was not tried.

Q What conversation did you have with him concerning this case with particular reference to Blackmon if he made any statement to you about Blackmon?

Objection - overruled - exception. EXCEPTION NO. 47.

A He stated that during the afternoon of September 16 he, Cook, Elmer Matthews, David Brock, A. Q. Blackmon, Clarence White, Bill Hoard and Graham Griffin met on Lovers Lane out between the prison camp road and the cemetery road and discussed getting Wyatt. That they returned to the mill picket line and dispersed. That later on that night he and David Brock, Elmer Matthews, A. Q. Blackmon and Graham Griffin went to Cook's home to get some coffee. While there the Griffin boy asked where his rifle was. He stated it was behind the bed. After drinking coffee they went back out to the car and that his rifle was in the car. He was told that Griffin carried the rifle out in his overalls pants leg and that they then went to the picket line and dispersed again until sometime later when Brock and Matthews and Blackmon got together and said, "Let's go for a ride." That they went on out to Wyatt's home and he asked them not to shoot in there and one of them said, I don't recall which, said when they started a job they finished it, and that Brock and Blackmon were in the back seat discussing before they got there which could shoot from leftshoulder going by, and since neither one of them could they turned around and on the return trip past Wyatt's house Brock fired into the home of Wyatt and then they returned to the picket line where they dispersed again. He,

Cook, went to the office gate picket tent and Matthews and Brock, I believe, went to the picket tent at the back gate and Blackmon got off at Virginia Avenue and went from there to his home.

Motion to strike - overruled - exception.
EXCEPTION NO. 48.

CROSS-EXAMINATION (by Mr. Cahoon)

When I first saw David Brock that night, before I talked to Jim Cook, Mr. Everett or I questioned David Brock. Brock said, "Buddy, what are you trying to do, pin something on me?" He said he was at the back gate on picket duty. Before his arrest he said he knew nothing about the shooting at Wyatt's house. After he was arrested he was asked about the shooting again. He said he was standing on his constitutional right to make no further statement.

Jim Cook told me several tales about this thing. At first he said he had nothing to do with it at all. He said Matthews and Brock borrowed his gun. Later he implicated himself, Matthews and Brock. Months later he implicated another man, Blackmon, and several others, Clarence White, Bill Hoard, Graham Griffin. His latest story is that he said, "Let's don't do that. Don't do it." In his earlier story he did not mention any protest. When Cook made a statement about it before Matthews, Matthews' statement was, "That's right, that's what he says."

At this point defendant moves that the testimony about purported admissions by Cook to Sheriff Bardin be stricken from the record. Overruled. Exception.
EXCEPTION NO. 49.

JIM COOK (RECALLED) testified for the State (Direct Examination by Mr. Fountain):

It was a .22 rifle used in the shooting.

RECROSS-EXAMINATION (by Mr. Cahoon)

Sometime in November I told my wife that the

authorities at the prison camp questioned me. They questioned me. I do not deny that they threatened me.

REDIRECT EXAMINATION (by Mr. Fountain)

Nobody has threatened me that I know of.

THE STATE RESTS

At the conclusion of the State's evidence the defendant moved for judgment as of nonsuit. Motion denied. Defendant excepts.

EXCEPTION NO. 50.

DEFENDANT RESTS

Defendant renews his motion for judgment as of nonsuit. Motion overruled. Defendant excepts.

EXCEPTION NO. 51.

Defendant moves that a juror be withdrawn and a mistrial order, assigning as grounds for the motion the matters to which exceptions have hereinbefore been noted. Motion overruled. Defendant excepts.

EXCEPTION NO. 52.

As no exception is based on the charge of the Court to the jury, the same is omitted from the record.

The jury retired and considered the case.

VERDICT: The jury returned and returned their verdict as to the defendant: "Guilty of an Assault With a Deadly weapon."

At this point defendant moved the Court to set aside the verdict and grant to him a new trial because of the matters and errors hereinbefore set out in exceptions. Motion denied. Defendant excepts.

EXCEPTION NO. 53.

JUDGMENT AS TO DEFENDANT DAVID BROCK

The defendant David Brock is confined to jail for a period of two years and is assigned to work the roads under the supervision of the State Highway & Public Works Commission.

W. C. HARRIS,
Judge Presiding.

Defendant objects and excepts to the entry of judgment as to him and gives notice of appeal to the Supreme Court of North Carolina.
EXCEPTION NO. 54.

APPEAL ENTRIES

From the foregoing judgment as to him the defendant appealed to the Supreme Court. Notice of appeal is given and accepted in open Court, and further notice is waived. By consent the defendant is allowed 60 days within which to prepare and serve case on appeal and the State allowed 30 days thereafter to prepare and serve counter-case or exceptions. Appeal bond is fixed at $100.00. Appearance bond is fixed at $2,000.00. This 8th day of March, 1951.

W. C. HARRIS,
Judge Presiding.

The defendant hereby tenders the foregoing as a true and perfect statement of case on appeal to the Supreme Court of North Carolina.
This 4th day of May, 1951.

ROBERT S. CAHOON,
Attorney for Defendant.

Service of the foregoing statement of case on appeal is duly accepted, and a receipt of a copy of the same is hereby acknowledged, May 7, 1951.

GEORGE M. FOUNTAIN
Solicitor.

STIPULATION

It is stipulated and agreed that the foregoing is a true and perfect statement of case on appeal to the Supreme Court of North Carolina in the above entitled case.

This 30 day of July, 1951.

GEORGE M. FOUNTAIN, Solicitor.
ROBERT S. CAHOON,
Attorney for Defendant.

GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1. The defendant assigns as error the Trial Court's overruling as a matter of law, assuming the truth of all facts therein set forth, the defendant's plea of former jeopardy, and in overruling the defendant's motion that the jury be permitted to pass upon the issues of fact, as shown by EXCEPTIONS 1 and 2 (R p 19).

ASSIGNMENT OF ERROR 2. The defendant assigns as error the Trial Court's permitting in evidence, over defendant's objection, testimony of witness as to an incident involving conversations concerning threats made by one Cook against a prosecuting witness, out of the defendant's presence, and in no way connected with the defendant, as shown by EXCEPTIONS 3 through 29 (R pp 23, 24, 25 and 27).

ASSIGNMENT OF ERROR 3. The defendant assigns as error that the Trial Court permitted in evidence, over defendant's objections, testimony as to admissions and confessions by one Cook implicating the defendant, as shown by EXCEPTIONS 30 through 34, and 40 through 49 (R pp 27, 28; 30, 31; 32 and 33).

ASSIGNMENT OF ERROR 4. The defendant assigns as error that the Trial Court permitted in evidence, over defendant's objections, testimony

as to a conversation between one Cook and his father concerning a confession implicating the defendant, and testimony by said Cook that this conversation caused him to decide to testify against Brock, as shown by EXCEPTIONS 35 through 39 (R p 29).

ASSIGNMENT OF ERROR 5. The defendant assigns as error the Trial Court's overruling the defendant's motions for judgment as of nonsuit as shown in EXCEPTIONS 50 and 51 (R p 34).

ASSIGNMENT OF ERROR 6. The defendant assigns as error the Trial Court's overruling the defendant's motion that a juror be withdrawn and a mistrial ordered, as shown by EXCEPTION 52 (R p 34).

ASSIGNMENT OF ERROR 7. The defendant assigns as error the Trial Court's overruling the defendant's motion that the verdict be set aside and that he be granted a new trial, as shown in EXCEPTION 53 (R p 34).

ASSIGNMENT OF ERROR 8. The defendant assigns as error the Trial Court's entering the judgment as to defendant and over defendant's exception, as shown by EXCEPTION 54 (R p 35).

Respectfully submitted,
ROBERT S. CAHOON,
Attorney for Appellant.

(TRANSCRIPT CERTIFIED BY CLERK SUPERIOR COURT)

IN SUPREME COURT OF NORTH CAROLINA, FALL TERM, 1951,
EDGECOMBE COUNTY

No. 75

STATE

vs.

DAVID BROCK

JUDGMENT—October 31, 1951

This cause came on to be argued upon the transcript of the record from the Superior Court, Edgecombe County:

Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable W. A. Devin, Chief Justice, be certified to the said Superior Court, to the intent that the Judgement is affirmed.

And it is considered and adjudged further, that the Defendant and surety to the Appeal Bond, National Surety Corporation, do pay the costs of the appeal in this Court incurred, to wit, the sum of Thirty-eight and 35/100 dollars ($38.35), and execution issue therefor.

A True Copy:

Adrian J. Newton, Clerk of the Supreme Court.

IN SUPREME COURT OF NORTH CAROLINA

No. 75—Edgecombe

STATE

v.

DAVID BROCK

Appeal by defendant from Harris, J., March Term, 1951, of Edgecombe. Affirmed.

The defendant was indicted for secret assault on J. D. Wyatt and several others, September 16, 1949, (G. S. 14-31).

There was a verdict of guilty of assault with a deadly weapon, and from judgment imposing sentence defendant appealed, assigning error in the denial of his plea of former jeopardy and in the admission of certain testimony.

Attorney-General McMullan and Assistant Attorney-General Moody and Charles G. Powell, Jr., Member of Staff, for the State.

Robert S. Cahoon for Defendant, Appellant.

OPINION, DEVIN, C. J.—Filed October 31, 1951

This Court is of the opinion unanimously that defendant's plea of former jeopardy was properly denied. State v. Dove, 222 N. C. 162, 22 S. E. 2d 231; State v. Guice, 201 N. C. 761, 161 S. E. 533. But the members of the Court are evenly divided in opinion (Justice Valentine not sitting) whether error in the admission of testimony as to declarations and conduct of Jim Cook, in the absence of the defendant was prejudicial requiring a new trial. Hence the judgment of the Superior Court must stand affirmed, without becoming a precedent.

Judgment affirmed.

Valentine, J. took no part in the consideration or decision of this case.

Barnhill and Johnson, J. J., dissent for the reason they are of the opinion the defendant is entitled to a new trial for error in the admission of evidence of conduct and declarations of Jim Cook.

[File endorsement omitted.]

IN THE SUPREME COURT OF NORTH CAROLINA

[Title omitted]

Appeal docketed 7 August, 1951.
Case argued 4 September, 1951.
Opinion filed 31 October, 1951.
Final Judgment entered 31 October, 1951.

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full true and perfect copy of the record and proceedings in the above

entitled case as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office, in Raleigh, North Carolina, this the 23rd day of January, 1952.

———————, Clerk of the Supreme Court of the State of North Carolina.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 324, Misc.

[Title omitted]

ORDER ALLOWING CERTIORARI—March 31, 1952

On petition for writ of Certiorari to the Supreme Court of the State of North Carolina.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 681.

It is further ordered that the certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.